

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
)	
In the Matter of)	
High-Cost Universal Service Support)	WC Dkt. No. 05-337
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link Up)	WC Docket No. 03-109
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Numbering Resource Optimization)	CC Docket No. 99-200
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications Act of 1996)	
)	
Developing a Unified Inter-carrier Compensation)	CC Docket No. 01-92
Regime)	
)	
Inter-carrier Compensation for ISP-Bound Traffic)	CC Docket No. 99-68
)	
IP-Enabled Services)	WC Docket No. 04-36

**COMMENTS OF TW TELECOM INC., ONE COMMUNICATIONS CORP. AND
CBeyond INC.**

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tw telecom inc. (“TWTC”), One Communications Corp. (“One”), and Cbeyond Inc.
 (“Cbeyond”) (collectively, the “Joint Commenters”), by their attorneys, hereby file these
 comments in response to the FNPRM released in the above referenced dockets on November 5.¹

¹ *High-Cost Universal Service Support et al.*, Order on Remand and Report & Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008) (“*FNPRM*”). References to

I. INTRODUCTION AND SUMMARY

As Commissioners Adelstein, Copps, McDowell and Tate explained in their concurring joint statement (“Joint Statement”) released along with the FNPRM, the FCC has the opportunity in this proceeding to go a long way toward eliminating arbitrage opportunities in the intercarrier compensation regime. *First*, the FCC has taken an important first step in the comprehensive draft orders by recognizing that Sections 251(b)(5) and 252(d)(2) provide the strongest legal basis for FCC preemption of intrastate terminating access rates. Although the comprehensive draft orders implicate unnecessary legal and policy risks by proposing to set all terminating rates based on a new long run incremental cost (“LRIC”) methodology, the four commissioners propose the more prudent course of reducing intrastate terminating access rates to the level of interstate terminating access rates. If the FCC adopts this approach, it should do so by reducing intrastate rates in equal amounts each year over a five year transition period. During this time period, the FCC can determine the appropriate next steps for unifying terminating access rates, which can be most appropriately accomplished by applying the existing TELRIC methodology.

Second, the comprehensive draft orders sensibly limit the extent to which ILECs would be eligible for supplemental subsidy payments to compensate for reductions in terminating access revenues. No carrier, ILEC or CLEC, should be guaranteed a predetermined revenue stream. Furthermore, the FCC must recognize that it does not have the statutory authority to provide universal service funding for broadband internet access service. The FCC has classified that service as an information service and Section 254(c) of the Communications Act defines supported services as an evolving level of “telecommunications services.” The information

the “draft order” refer to the “Chairman’s Draft Proposal,” attached as Appendix A to the FNPRM, unless otherwise noted. References to the “comprehensive draft orders” mean the draft orders attached as Appendix A and Appendix C collectively.

service and telecommunications service classifications are mutually exclusive. Accordingly, the FCC may not condition access to universal service funds on carriers' deployment of broadband, nor may it establish a broadband fund for lifeline customers.

There are a number of other reforms proposed in the draft orders that should be either modified or rejected, as follows.

- The FCC should modify its SLC rules to ensure that ILECs cannot recover reductions in terminating access rates in an inappropriate manner. The FCC should ensure that reductions in access revenues associated with multiline business customers are recovered solely from SLC increases for such customers.
- In reforming the universal service contribution methodology regime, the FCC must ensure that the relative burden on business and residential customers remains the same over time. Contributions needed to pay for future increases in the fund should not be solely or disproportionately recovered from business services.
- The proposed classification of IP/PSTN service as an information service in the comprehensive draft orders has no basis in law, is unnecessary for the advancement of the FCC's objective of unifying rates for traffic termination, and would place important carrier rights (such as UNE access) at risk.
- There is no basis for preempting state regulation of IP/PSTN service (other than of course intrastate terminating access rates pursuant to Section 251(b)(5)), and broad preemption of state regulation is not necessary to unify intercarrier rates.
- The FCC should apply access charges to IP/PSTN service and should do so in this rulemaking proceeding; waiting to do so in an adjudicatory or quasi-adjudicatory proceeding such as a forbearance proceeding risks retroactive application of access charges, which is clearly not in the public interest.
- The FCC should not adopt new interconnection architecture rules in this proceeding; changes to such rules are unnecessary and, as proposed, are not relevant to newly deployed IP-based networks.
- The FCC does not have the authority to regulate intrastate originating access rates.

II. DISCUSSION

Given the complexity of this proceeding, the four Commissioners are correct that the FCC should focus on adopting pragmatic solutions to the most pressing problems associated with

intercarrier compensation and universal service.² Moreover, in doing so, the FCC should ensure that the adopted reforms do not undermine competition or unnecessarily burden certain types of customers.

A. If The FCC Seeks To Unify Terminating Rates, It Should Unify Terminating Access Rates Pursuant To A Five-Year Transition.

As recognized by the comprehensive draft orders, Sections 251(b)(5) and 252(d)(2) offer the soundest legal basis for preempting intrastate terminating access rates and unifying all terminating rates. However, if the FCC were to take any action on rate unification, it should focus on unifying interstate and intrastate access rates as the first step to unifying all terminating intercarrier rates subject to Section 251(b)(5) in a later order. Reducing intrastate terminating access rates to interstate terminating access rate levels would be a major step toward unifying all terminating rates, and it implicates a very large portion of LECs' terminating revenues. It therefore makes sense to establish an extended transition. Accordingly, interstate and intrastate access rates should be unified in equal steps over a period of five years. The FCC need not take any other steps right now. Reducing intrastate terminating access rates to the level of interstate access rates is a necessary component of any intercarrier compensation regime, as is a substantial transition. If the FCC commences access charge unification now while simultaneously assessing subsequent steps in the rate unification process, it will not in any way delay implementation of the final steps in the reform process.

² See Joint Statement of Commissioners Copps, Adelstein, Tate and McDowell, attached to the FNPRM.

B. There Is No Basis For The Proposal To Adopt LRIC As The Basis For Setting Traffic Termination Rates.

There is no basis for the proposal in the comprehensive draft orders to adopt a new LRIC-based cost methodology for all terminating access rates. As the Joint Commenters have previously explained, the manner in which TELRIC calculates the costs of termination satisfies the “additional cost” standard of Section 252(d)(2). Furthermore, the TELRIC methodology appears to track closely the actual costs incurred by carriers when terminating traffic.³ Recent evidence submitted into the record by CLECs demonstrates that TELRIC remains a reasonable approximation of the additional costs of termination.⁴ If anything, the current TELRIC methodology appears to underestimate the costs of termination because it excludes the cost of shared loop facilities. This is an increasingly large portion of LECs’ costs because LECs are steadily replacing dedicated loop connections between a central office and an end user with shared fiber feeder loops and neighborhood passive optical networks. *See Willkie Oct. 14 Letter* at 5-6.

Moreover, the FCC failed to support its proposed LRIC-based pricing methodology with substantial evidence.⁵ No party advocated adopting the LRIC-based proposal adopted in the

³ *See Ex Parte* Letter of Thomas Jones, Counsel, tw telecom *et al.*, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 & 96-45, WC Dkt. Nos. 05-337 *et al.*, at 5-6 (filed Oct. 14, 2008) (“*Willkie Oct. 14 Letter*”).

⁴ *See, e.g., Ex Parte* Letter of John J. Heitmann, Counsel, NuVox, to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-92 (filed Oct. 24, 2008) (attaching a declaration showing that TELRIC captures the “additional costs” of softswitches as well); *Ex Parte* Letter of Brad Mutchelknaus, Counsel, NuVox, to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-92, WC Dkt. No. 04-36 (filed Oct 2, 2008) (attaching a study by QSI Consulting showing that NuVox’s actual cost of termination is well above \$0.0007).

⁵ *See NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) (“Substantial evidence is more than a scintilla.... It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” (internal quotation marks omitted)).

comprehensive draft orders. Nor did any party even attempt to show that such a methodology would produce reasonable rates and/or rates that would meet the “additional costs” standard of Section 252(d)(2). As Dr. Lee Selwyn explains in a paper filed today in the above-referenced dockets, the FCC’s proposed LRIC methodology is inconsistent with economic theory and would yield discriminatory outcomes that arbitrarily favor the large BOCs as compared to smaller, more specialized CLECs.⁶ In fact, the FCC has not even attempted to supply a factual predicate for its proposed methodology. The FCC candidly admits that “there appear to be no cost studies or analysis in the record that attempt to estimate the terminations costs using Faulhaber’s definition of incremental cost.” *Draft Order* ¶ 253. Accordingly, it is unlikely that the FCC’s standard would withstand review on appeal, particularly if evidence supporting the suitability of the LRIC-based cost standard is not placed on the record.

In its FNPRM, the FCC asks whether “the terminating rate for all § 251(b)(5) traffic be set as: (i) a single, statewide rate; or (ii) a single rate per operating company.” *FNPRM* ¶ 41. Under the most reasonable reading of the statute, states should, as the FCC determined in the *Local Competition Order*, set rates for Sections 251(b)(5) traffic on an ILEC-by-ILEC basis.⁷ Moreover, there is no reason to reverse the FCC’s finding in the *Local Competition Order* that CLEC rates should mirror the ILEC rate in that area because their costs (at least as measured pursuant to TELRIC) are likely to be similar. *See Local Competition Order*. Of course, this is not always the case. The FCC should therefore retain the rule that, if “a competing local service

⁶ See Declaration of Dr. Lee L. Selwyn, attached to *Ex Parte* Letter of Brad Mutchelknaus *et al.*, to Marlene Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 & 96-45, WC Dkt. Nos. 05-337 *et al.* (filed Nov. 26, 2008).

⁷ *Implementation of the Local Competition Provisions in the Telecommunications Act*, First Report and Order, 11 FCC Rcd 15499, ¶¶ 1085-1086 (“*Local Competition Order*”).

provider believes that its cost will be greater than that of the incumbent LEC for transport and termination, then it must submit a forward-looking economic cost study” to establish its own rates. *See id.* ¶ 1089. To be sure, as the FCC has recognized, only the largest carriers can practically undertake such a study. *See id.* ¶ 1085. Thus, granting carriers the right to demonstrate their own costs (something the draft orders do not even do), is no substitute for the adoption of a sound methodology for determining “additional costs” under Section 252(d)(2). It is simply one aspect of any cost-based methodology.

C. Any Alternative Cost Recovery Mechanism Should Be Limited And Available to CLECs.

If the FCC adopts any “make whole” mechanism to compensate ILECs for reduced terminating access revenues, it should adopt the approach set forth in the comprehensive draft orders under which ILECs’ access to such make-whole subsidies would be limited. In particular, the FCC should adopt the “normal profit” test for determining whether a price-cap ILEC would be eligible to draw from the fund. *See Draft Order* ¶ 317. Moreover, if an ILEC is eligible for make-whole payments pursuant to this test, CLECs should be equally eligible pursuant to the same test.

D. The FCC May Not Subsidize Broadband Information Services With Universal Service Funding

The comprehensive draft orders propose (1) conditioning universal service support on carriers’ deployment of broadband (*see Draft Order* ¶¶ 19-25), and (2) establishing a \$300 million “pilot” broadband fund for lifeline customers. *See id.* ¶¶ 65-91. However, the FCC does not have the authority to adopt either proposal.

In the *Wireline Broadband Order*, the FCC determined that broadband is an information service.⁸ The Act is crystal clear that universal service funding is only permitted for an “evolving level of telecommunications services.” 47 U.S.C. § 254(c)(1). The FCC has concluded that a service cannot simultaneously qualify as an information service and a telecommunications service.⁹ Accordingly, the FCC may not subsidize broadband deployment through universal service mechanisms.

The FCC asserts that conditioning universal service support on broadband deployment is consistent with the “objectives” of Section 706. *See Draft Order* ¶ 21. But Section 706 is not an affirmative grant of authority; it merely “directs the Commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services.”¹⁰ Section 706 cannot therefore support the FCC’s legal theory.

Similarly, the FCC seeks to justify its broadband pilot program by asserting that it has the authority to commence that program under Sections 1, 4(i), 201, 205, and 254 of the Act. *See Draft Order* ¶ 71. But the FCC must do more than summarily invoke section 1 and the suggestion of ancillary jurisdiction as a talisman to justify what it could not otherwise do under

⁸ *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 12 (2005).

⁹ *See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, Order on Remand, 16 FCC Rcd 9751, ¶ 36 (2001) (affirming its prior findings that “‘telecommunications service’ and ‘information service’ are mutually exclusive”).

¹⁰ *See Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, Memorandum Opinion & Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, ¶ 69 (1998) (“After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress’ policy objectives, we agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods.”).

the Act. While it is unlikely that the FCC could justify its broadband pilot program under its ancillary jurisdiction, it does not even attempt to undertake the ancillary legal analysis.

The FCC also cites to statutory principles underlying the universal service program as an additional legal basis for its pilot program. *See id.* ¶ 72. But the FCC cannot rely on congressional intent when the language of a statutory provision is clear on its face.¹¹ The reference to “telecommunications service” in Section 254(c) could not be clearer, and there is therefore no basis for even considering congressional intent that would run contrary to the terms of the Act.

E. The FCC Should Appropriately Limit ILECs’ Ability To Recover Foregone Multiline Business Access Revenues From Residential SLCs

As the comprehensive draft orders propose, ILECs should be allowed to recover foregone terminating access revenues from SLC cap increases. *See Draft Order* ¶¶ 296-310. As the Joint Commenters have explained, however, the FCC should establish rules to ensure that ILECs cannot subsidize end-user rates or SLCs in product markets and geographic markets subject to more competition (e.g., enterprise market and urban markets) with SLC increases in areas subject to less competition (e.g., mass market and rural markets). *See Willkie Oct. 14 Letter* at 13-14. As explained, absent such protections, competition in downstream retail markets will be distorted. *See id.* Thus, although the comprehensive draft orders do not address this issue, the FCC should do so in any order adopted in this proceeding. *See id.*

¹¹ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984) (“[I]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

F. The FCC Should Not Adopt A New USF Contribution Methodology For Business Services At This Time.

The draft orders include proposals for two different approaches to universal service contribution methodology reform. In the first (found in the comprehensive draft orders), the FCC would assess a \$1 contribution on residential telephone numbers. USF requirements not covered by residential telephone number contributions would be funded by business customers on a per-connection basis with the per-connection contribution level set pursuant to an FNPRM. *See Draft Order* ¶¶ 105-134. In the second (found in Appendix B), the FCC would impose an \$.85 per number assessment on all telephone numbers (both business and residential), and the FCC would also impose a connection-based charge on business customers that would vary depending on the capacity of the business connection. *See Appendix B* ¶¶ 52-82.

As the Joint Commenters have explained, adoption of either of these methodologies would result in enormous and arbitrary increases in the contributions of certain types of business customers (e.g., universities, hospitals, charitable organizations and government agencies). *Willkie Oct. 14 Letter* at 16-17. Many or most of these customers would likely pay these increases since carriers generally pass USF contributions through to end users. It is not obvious how the FCC could design a new USF contribution methodology for business services that does not cause large increases in certain businesses' contributions. Nor is reforming USF contributions a necessary component of or precondition for intercarrier compensation reform. The FCC should and can proceed with caution by studying the real-world consequences of reform proposals before rashly adopting an approach. Accordingly, the FCC should follow the approach taken in the Chairman's draft orders in Appendices A and C, and seek comprehensive industry input on the most appropriate means of reforming USF contributions for business service prior to adopting new rules.

Regardless of the proposal ultimately adopted, the FCC must ensure that businesses are not required to bear a disproportionate universal service contribution burden. In other words, the relative business/residential contribution percentage must remain constant. For example, if a \$1 per residential number assessment means that 45 percent of the fund would be paid for by businesses, the FCC must ensure that this percentage remains the same over time. Therefore, if the size of the fund were to increase in a particular year by 10 percent, and the amount of assessable numbers remained the same, the per number contribution for residential customers should increase by 10 percent as well.

G. The FCC Should Not Classify VoIP As An Information Service.

The comprehensive draft orders classify voice service that originates in IP and terminates on the PSTN (“IP/PSTN voice service”) as an information service. *See Draft Order* ¶ 209. This classification has no basis in law, and it does not advance the FCC’s goal of unifying intercarrier compensation rates.

The proposed information service classification is based on the fact that a net protocol conversion takes place during an IP/PSTN communication. But the mere presence of protocol conversion in IP/PSTN traffic is not a sound basis for classifying IP/PSTN traffic as an information service. As the Joint Commenters have explained previously, there are many instances, for example in traffic exchanged between CMRS networks, where a net protocol conversion takes place (e.g., between GSM and CDMA). Yet services that undergo such conversions remain classified as telecommunications services.¹²

¹² *See* Comments of Time Warner Telecom, WC Dkt. No. 04-36, at 25 (May 28, 2004), attached to *Ex Parte* Letter of Jonathan Lechter, Counsel, tw telecom inc., to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 & 96-45, CC Dkt. Nos. 05-337 *et al.* (filed Oct. 24, 2008).

The FCC observes that a service is not classified as an information service where there is “no change in an existing service, but merely a change in electrical interface characteristics to facilitate transitional introduction of new technology.” *Draft Order* ¶ 210 (internal citation omitted). The FCC argues that IP/PSTN services do not fall within this rule because IP/PSTN services are not “mere changes to the underlying technology used for ‘existing’ basic services, but are entirely new services with characteristics in many ways distinct from pre-existing telephone services.” *Id.* But this is simply not the case. As *tw telecom* has explained in detail, there are no fundamental differences between circuit-switched and VoIP services.¹³ Any differences are differences of degree, not of kind.¹⁴

Under the FCC’s logic, there are any number of services that could be classified as information services, including many transmission services currently demanded by businesses. For example, carrier Ethernet service could be transformed into an information service because (1) carriers offer Ethernet users protocol conversion as part of the Ethernet service and (2) Ethernet service provides better, more robust features than legacy ATM and TDM services. Yet the FCC has clearly stated that Ethernet service is a telecommunications service. *See Wireline Broadband Order* ¶ 9.

In addition, many medium and larger sized companies are served by networks that involve multiple net protocol conversions. A multi-location customer might be served at some locations with a TDM-based service, at another location with an ATM-based service and at

¹³ *See Ex Parte* Letter of Thomas Jones, Counsel, *tw telecom inc.*, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 & 96-45, CC Dkt. Nos. 05-337 *et al.* (filed Oct. 23, 2008) (“*Willkie Oct. 23 Letter*”).

¹⁴ For example, while providers of both circuit-switched and VoIP services can tell the user when members of a work group are currently talking on the phone through an on-screen display, the same functionality can be provided by lights on a circuit-switched office handset. *See id.* at 5.

another location with Ethernet-based service. Carriers provide the protocol conversion functionality so that all of these locations can exchange data. Like IP/PSTN service, Ethernet service has substantial advantages over older transmission technologies with similar, but less robust features. As a result of these advantages, Ethernet, like IP/PSTN service, is slowly replacing older transmission technologies. Classifying Ethernet service as an information service would therefore foreclose FCC jurisdiction to regulate what will become the PSTN in the future for business customers. This change would be the result of the adoption of a new technology, one similar to the replacement of analog switches with digital switches. Such a change does not eliminate the ILECs' market power (derived from their control over fiber and copper bottleneck end user connections) or any other basis for continued regulation, and it therefore should not be the basis for reclassification as an information service.

The classification of IP/PSTN service as an information service would also place important carrier rights at risk. As carriers continue to migrate their networks to IP, they would no longer be providing "telecommunications service" under the proposed definition in the comprehensive draft orders. A competitor is eligible for certain of the bedrock Section 251(c) rights, including arguably UNE access and collocation, only to the extent that the competitor is providing a telecommunications service. *See* 47 U.S.C. §§ 251(c)(3), (6). If basic voice service, provided via IP, were classified as an information service, there is a substantial risk that competitors would be deemed to not qualify for these critical inputs.

Moreover, there is no need for the FCC to classify IP/PSTN traffic as an information service in order to unify intercarrier terminating rates. Indeed, under the legal theory set forth in the comprehensive draft orders, the FCC could unify all terminating rates, including rates for IP/PSTN traffic, because IP/PSTN service is provided via telecommunications and therefore

could be regulated pursuant to Section 251(b)(5). *See Draft Order* n.564. Therefore, obtaining jurisdiction over IP/PSTN traffic under Section 251(b)(5) is possible regardless of whether IP/PSTN service itself is classified as a telecommunications or as an information service.

H. There Is No Basis For Sweeping FCC Preemption Of State Regulation Of IP/PSTN Service.

The comprehensive draft orders propose preempting state economic and entry regulation of all IP/PSTN services. The draft orders do not include an explicit legal rationale for such preemption, but the drafts imply that preemption is permissible simply because the FCC is classifying IP/PSTN service as an information service.¹⁵ This is incorrect. As the Ninth Circuit has held, states have the jurisdiction to regulate intrastate information services.¹⁶

As TWTC has explained, absent an express grant of statutory authority (which does not exist in this context), the FCC may preempt state regulation of a service (either telecommunications service or information service) with an intrastate aspect only if the requirements of the “impossibility doctrine” are met. As the FCC acknowledged in the *Vonage Order*, under that doctrine, the FCC may preempt state regulation of services that have an intrastate component if (1) it is impossible or impractical to separate the interstate and intrastate components of the service (the “inseverability” prong) and (2) the state regulation at issue would thwart or negate the implementation of a defined federal policy (the “purpose” prong). In the *Vonage Order*,¹⁷ the FCC found that the test was met with respect to state entry and economic

¹⁵ *See Draft Order* ¶ 211 (“We preempt any state efforts to impose ‘traditional ‘telephone company’ regulations’ as they relate to IP/PSTN information services as inconsistent with our generally unregulated treatment of information services.”).

¹⁶ *California v FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990) (“*California I*”).

¹⁷ *See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd

regulation of nomadic VoIP service. *See Vonage Order* ¶¶ 23-37. As TWTC explained at length, neither prong is met with respect to geographically fixed VoIP service. *See generally Willkie Oct. 23 Letter*. But the discussion in the comprehensive draft orders does not even *consider* whether the impossibility doctrine is satisfied. The draft orders simply assert, with no analysis, that the preemptive effect of the *Vonage Order* applies to all IP/PSTN services. *See Draft Order* ¶ 211.

Furthermore, preemption of state regulation of IP/PSTN service is not relevant to the FCC's goal of unifying all intercarrier rates (except to the extent that the FCC must preempt intrastate terminating access rates, which is not relevant here). For example, whether a state has the authority to regulate ILEC end user rates for intrastate IP voice service simply has no relevance to intercarrier compensation reform. In addition, as the Joint Commenters have argued, preventing states from regulating intrastate voice service would be affirmatively harmful to competition. *See Willkie Oct. 23 Letter* at 8-11.

I. The FCC Should Apply Access Charges On A Prospective Basis To IP/PSTN Traffic.

While the comprehensive draft orders are not entirely clear on the subject, they appear to say that the FCC should not decide whether access charges apply to VoIP (it will “maintain the status quo”) until the issue becomes moot when reciprocal compensation rates and access rates equalize during its planned 10 year transition. *See Draft Order* n.564. Under the “*status quo*,” private parties have litigated the application of access charges to VoIP at state Commissions and in the courts. Clarifying whether access charges apply would benefit all carriers. Thus, as the

22404 (2004) (“*Vonage Order*”), *aff'd sub nom. Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

Joint Commenters have argued, it would be the best policy for the FCC to apply access charges to VoIP in the future, and the easiest way to do so would be to simply classify VoIP service as a telecommunications service.¹⁸

If the FCC applies access charges to VoIP, it must ensure that access charges do not apply retroactively.¹⁹ Retroactive application would upset settled business expectations and would invite a litigation nightmare as parties fight over the nature and jurisdiction of years-old traffic. Carriers currently track the jurisdiction of and apply intercarrier rates to VoIP traffic based on (1) the trunk group over which the VoIP traffic is delivered (switched access rates apply to traffic delivered over Feature Group D trunks and reciprocal compensation rates apply to traffic delivered over local trunks), and (2) traffic studies (e.g., percentage of interstate usage studies). If these methods prove to be unreliable, it is extremely hard, if not impossible, for a terminating carrier to go back later and determine the jurisdiction of the traffic sent. Retroactive review of VoIP traffic termination would be extraordinarily burdensome.

The FCC can all but eliminate the need for such a review if it classifies VoIP as a telecommunications service in this proceeding. The Supreme Court has held that retroactive application of a rule established in a rulemaking proceeding is not permitted unless Congress has expressly authorized such application.²⁰ In his oft-cited concurrence in *Bowen*, Justice Scalia

¹⁸ See TWTC Comments, WC Dkt. No. 04-36, at 42 (filed May 28, 2004).

¹⁹ See *Ex Parte* Letter of Thomas Jones, Counsel, TWTC, One Communications Corp., and Cbeyond Inc., to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 & 96-45, CC Dkt. Nos. 05-337 *et al.*, at 1 (filed Oct. 28, 2008).

²⁰ See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("*Bowen*"), *affirming*, *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750 (D.C. Cir. 1987). See also *MPAA v. Oman*, 969 F.2d 1154, 1157 (D.C. Cir. 1992) ("The holding of *Bowen* is that agencies do not have the authority to promulgate retroactive rules unless Congress has expressly said they do.")

explained that the Administrative Procedure Act requires that legislative rules (rules established in a rulemaking) be given prospective effect only.²¹ The Supreme Court has held that a rule is “retroactive” where it (1) impairs rights a party possessed when he acted; (2) increases a party’s liability for past conduct; or (3) imposes new duties with respect to transactions already completed.²² Here, application of access charges to VoIP traffic that has already been terminated would clearly come within the definition of “retroactive” because such action would increase a LEC’s liability for past conduct or impose a new duty with respect to a transaction that has already been completed. Retroactive application of access charges to VoIP traffic would also alter the legal consequences of past actions by making termination of VoIP traffic without paying access charges unlawful.

A determination in this proceeding that access charges apply to VoIP traffic could be made based on the record established in response to the IP-Enabled Services or Intercarrier Compensation FNPRMs, and would therefore be a decision in a rulemaking.²³ As a result, if the FCC were to modify the comprehensive draft orders to make clear that access charges apply, retroactive application of such a rule would be impermissible because the Communications Act does not expressly permit such an application.

However, if the FCC were to determine in an adjudicatory or quasi-adjudicatory proceeding that access charges apply to VoIP, it may be more difficult to avoid retroactive

²¹ See *Bowen*, 488 U.S. at 216-20 (Scalia, J., concurring).

²² See *DIRECTV v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

²³ See, e.g., *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, ¶ 80 (2005) (seeking comment on the application of intrastate access charges to VoIP); *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶ 32 (2004) (seeking comment on whether access charges should apply to VoIP).

application. There are currently two forbearance petitions pending before the FCC, one filed by Feature Group IP (“FGIP”) and one filed by Embarq.²⁴ The FCC must rule on the FGIP petition by January 21, 2009 or it will be granted by default. Both of these petitions ask that the FCC make a determination of whether access charges apply to VoIP. As the Joint Commenters and others have argued, because of substantial procedural defects in these petitions, the FCC may dispose of them without making a determination on the merits of whether access charges apply to VoIP.²⁵ However, if, in ruling on these petitions, the FCC were to determine that access charges apply to VoIP, the FCC would likely be required to conduct a retroactivity analysis.²⁶ Even if the FCC were to determine that access charges should not apply retroactively, there is no guarantee it would be upheld on appeal. All of this just shows that the far better course is for the FCC to rule in this rulemaking proceeding that access charges apply to VoIP service and that they apply prospectively only.

²⁴ See Petition of Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b) and Commission Orders on the ESP Exemption, WC Dkt. No. 08-8 (filed Jan. 11, 2008); Feature Group IP Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(a)(1) and Rule 69.5(b), WC Dkt. No. 07-256 (filed Oct. 23, 2007).

²⁵ See Comments of Time Warner Telecom Inc., Cbeyond Inc. and One Communications Corp., WC Dkt. No. 08-8, at 7-8 (filed Feb. 19, 2008) (arguing that Embarq can only apply access charges to VoIP through an affirmative rule change, not forbearance, and that Section 10 does not permit Embarq to obtain relief from rules that apply to other carriers). See also Comments of Time Warner Telecom Inc., Cbeyond Inc. and One Communications Corp., WC Dkt. No. 07-256, at 3-4, 7-8 (filed Feb. 19, 2008) (arguing that FGIP may not “clarify” that the ESP exemption applies to FGIP through a forbearance petition and Section 10 does not permit FGIP to obtain relief from rules that apply to other carriers).

²⁶ See *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (holding that “equity and fairness” determine whether a decision applies retroactively).

J. The FCC Should Not Alter The Rules Governing Interconnection Architecture.

The comprehensive draft orders incorporate *in toto* AT&T's proposal for mandated interconnection architecture. *See Draft Order* ¶ 275. The FCC should not include these rules in any final order adopted. As the Joint Commenters have explained, (1) there is no reason to alter current interconnection arrangements that have been in place for decades in some cases; (2) there is no logical connection between changes to interconnection architecture and intercarrier compensation reform; and (3) the rule changes included in the comprehensive draft orders would violate CLECs' statutory right to interconnect at any "technically feasible point." *See Willkie Oct. 14 Letter* at 15. Furthermore, it makes no sense to formulate interconnection architecture rules for circuit switched networks that will take effect in 10 years when most carriers' networks will likely be purely or largely IP-based (and therefore configured very differently) by that time. The FCC's proposal is akin to setting standards for whale oil lamps just as the incandescent bulb begins to dominate the lighting market. The FCC should therefore forego further consideration of interconnection architecture rules.

K. There Is No Basis For Reforming The Rules Governing Originating Access Charges.

The comprehensive draft orders propose capping originating interstate and intrastate access rates and the associated NPRM seeks comment on how to reduce originating access rates to zero. *See Draft Order* ¶ 229. But there is little point in this inquiry because the FCC likely does not have the authority to set originating intrastate access rates. For example, Section 251(b)(5), the most logical basis for FCC authority over originating access, refers solely to "termination" of traffic. Nor does any other provision of the Communications Act grant the FCC authority over intrastate "originating" services.

In any event, with fewer stand-alone long distance providers, the volume of originating access minutes has no doubt declined substantially in the last few years, and this trend will almost certainly continue. As a result, any arbitrage opportunities associated with what might be above-cost originating intrastate access rates are likely minimal and will continue to decline. Rather than attempting to address an issue over which the FCC lacks authority and which is gradually disappearing, the FCC should focus instead on reforming terminating rates in this proceeding.

III. CONCLUSION

The FCC should adopt the foregoing proposals for the reasons discussed above.

/s/

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